Supreme Court, U.S.
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No. 92-758

In The

Supreme Court of the United States

October Term, 1992

PATRICIA A. CAMPBELL and THOMAS CAMPBELL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

TAYLOR W. JONES
MYLES E. EASTWOOD*
JONES, BROWN, BRENNAN & EASTWOOD
1900 One Georgia Center
600 West Peachtree Street, N.W.
Atlanta, GA 30308
(404) 872-5300

REID W. KENNEDY
REID G. KENNEDY
KENNEDY & KENNEDY
1495 Powers Ferry Road
Marietta, GA 30067-5411
(404) 953-3100

Attorneys for Petitioners

*Denotes counsel of record.

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QUESTIONS PRESENTED

1. Whether a substantive due process attack on a state rule of decision that is incorporated into a Federal statute, such as the Federal Tort Claims Act, and then used by a Federal court to determine Federal rights and liabilities under that statute, is adjudicated under the Fifth Amendment, or is adjudicated under the Fourteenth Amendment which additionally requires "state action"?

2. Whether a law, refusing to allow a damages claim for the wrongful preclusion of Petitioners' right to elect a pre-viability abortion of a genetically deficient fetus, constitutes an undue burden on the parents' liberty interest in this most personal of family decisions?

(The United States Court of Appeals for the Eleventh Circuit, in its majority opinion, answered Question One by utilizing the Fourteenth Amendment and affirmed a judgment for Defendant on a "state action" basis, while the concurring opinion below reached the merits of the Constitutional question in Question Two but found no "undue burden".)

REPLY TO BRIEF IN OPPOSITION

Pursuant to SUP. CT. R. 13.5, Petitioners hereby respond to matters asserted for first time in the *Brief in Opposition*.

Respondent argues on pages 6-7 in its *Brief in Opposition*, at footnote 3, that "the lower courts" viewed Petitioners' claims as arising under the Fourteenth Amendment. A review of the district court decision, Pet. App. 21a-28a, 795 F.Supp. 1127 (N.D.Ga. 1991), discloses no discussion of state action or the Fourteenth Amendment. Thus, only the two-judge majority of the Eleventh Circuit panel focused on the Fourteenth Amendment.

Additionally, Respondent in the *Brief in Opposition*, at 4, states that: "Judge Anderson concurred. He believed that Georgia's decision not to recognize a wrongful birth cause of action did involve State action. Pet App. 13a." However, a review of the concurring opinion at Pet. App. 13a shows that it does not focus on state action but instead looked at the substantive due process claim at issue. The concurring opinion below actually stated at Pet. App. 13a:

> Because this is a FTCA case, it is clear that the district court properly looked to Georgia medical malpractice law, but it is also clear that, under the Supremacy Clause, Georgia law applies only to the extent that it is consistent with the United States Constitution. If the Georgia Supreme Court's opinion in *Atlanta Obstetrics & Gynecology v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990), articulated an unconstitutional rule of law, the district court could not

properly apply it in construing Georgia's medical malpractice scheme.

The first time the Fourteenth Amendment and/or state action were mentioned by the Government in the *Brief of Appellee*, at 9-11, in the Eleventh Circuit, the Government conceded that Petitioners: " . . . do not specifically cite the Fourteenth Amendment in their Brief. . . . " *Brief of Appellee*, at 9 n.4. Having successfully directed the Court of Appeals' attention to the "state action" issue, the Respondent does *not* directly argue in this Court that the majority opinion below is correct. *See Brief in Opposition*, 6-7. The Government only notes that: " . . . it is natural that the courts [*sic*] below evaluated petitioners' claims under the Fourteenth Amendment." *Brief in Opposition*, 7. However, it is telling that the rephrasing of the Issue in this case by Respondent focuses on the Due Process Clause and not whether the Eleventh Circuit properly resolved the case on a "state action" basis.

CONCLUSION

The Court should view the *Brief in Opposition*, on the "state action" issue for what it is, i.e., a tacit admission that majority opinion below incorrectly resolved the matter.

This case is worthy of the grant of certiorari because, as a result of the Respondent's misdirected advocacy below, there is now a published decision that under one statutory scheme enacted by Congress (the Federal Tort Claims Act) the rule of decision incorporated into federal

law by Congress is to be measured under the Fourteenth Amendment, while in other statutory schemes enacted by Congress (such as the Social Security Act and the Federal Assimilative Crimes Act) the rule of decision incorporated into federal law by Congress is to be governed under the Fifth Amendment. This anomaly will only continue to produce bad law and is patent error.

If for no other reason, the opinion of the Eleventh Circuit should be vacated and the case remanded for reconsideration under this Court's decision, not that of the Third Circuit, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 112, S.Ct. 2791, 120 L.Ed.2d 674 (1992).[1]

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[1] On remand, the Eleventh Circuit can certify the damages issue to the Georgia Supreme Court if it concludes that the state rule of decision is unconstitutional. Such certification on the damages issue does not involve the issue presented in this case and would allay the concerns argued by Respondent in the *Brief in Opposition*, at 10.

Alternatively, the writ should be granted and this Court should reach the merits of the substantive due process issue.

Respectfully submitted,

TAYLOR W. JONES
MYLES E. EASTWOOD*
JONES, BROWN, BRENNAN
& EASTWOOD
1900 One Georgia Center
600 West Peachtree Street, N.W.
Atlanta, GA 30308
(404) 872-5300

REID W. KENNEDY
REID G. KENNEDY
KENNEDY & KENNEDY
1495 Powers Ferry Road
Marietta, GA 30067-5411
(404) 953-3100

Attorneys for Petitioners Patricia A. Campbell and Thomas Campbell

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